Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-125

RICHARD J. GETTY - - - - Petitioner

Vs.

COMMONWEALTH OF KENTUCKY, EX REL
KENTUCKY BAR ASSOCIATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of Kentucky (Petition, Appendix, pp. 17a-26a) is unreported at this time.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether the disciplinary proceeding of the Kentucky Bar Association and the Court of Appeals of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law, equal

protection of the laws, and protection of his First Amendment rights under the Constitution of the United States?

II. Whether the evidence supports the findings and judgment of the Court of Appeals of Kentucky?

RULES INVOLVED

Kentucky Rules of the Court of Appeals Concerning Procedures in Disciplinary Cases

The pertinent provisions of Rules of the Court of Appeals of Kentucky, RCA 3.140, *et seq.*, are set forth in the Appendix hereto or citations made to the Appendix to the Petition.

STATUTORY PROVISIONS INVOLVED

Kentucky Revised Statute 30.170

Petition, Appendix A, pp. 2a-3a

STATEMENT OF THE CASE

A charge was filed against the Petitioner, Richard J. Getty, by the Kentucky Bar Association on May 3, 1973, consisting of six (6) counts relating to Petitioner's unethical and unprofessional conduct as defense counsel in the case of *Commonwealth v. Lance Kohler,* Fayette County Kentucky Circuit Court. An additional charge was filed against Petitioner on August 2, 1973, consisting of four (4) counts relating to Petitioner's unethical and unprofessional conduct as defense counsel in the Kentucky cases of *Commonwealth v. Campbell,* Harrison County Court; *Commonwealth v. Morgan,* Nicholas County Circuit Court; and *Commonwealth v. Hilander, Jr.,* Nicholas County Court. By order of Respondent's Inquiry Tribunal dated August 2, 1973, the two charges were consolidated pur-

suant to the provisions of Rule of the Kentucky Court of Appeals 3.260 (hereinafter referred to as RCA) and ordered tried as a single disciplinary case. (Appendix A, p. 1a). Responses to the charges were duly filed by the Petitioner.

Thereafter, a trial committee of the bar association composed of three attorneys conducted a trial hearing from November 26, 1973, through November 29, 1973. The trial committee in its report to the Board of Governors filed on July 3, 1974, recommended a finding that all counts of both charges were not proven by a preponderance of the evidence and they should be dismissed.

Thereafter, the Board of Governors on July 20, 1974, considered the trial committee's report, reviewed the record and recommended to the Court of Appeals of Kentucky a finding of not guilty on all counts except Count I of the second charge. The Board of Governors recommended a finding of guilt on the count stating:

> "In the Harrison County Court case styled Commonwealth vs. Campbell, Respondent Richard J. Getty, during his representation of the defendant Campbell at a trial on or about March 27, 1973, called County Attorney John M. Keith a 'damn liar' on two occasions out of the presence of the jury. After repeated admonishment of County Judge Carl Nunnelley regarding respondent's remarks and attitude toward witness State Trooper John Conley continued his badgering and harrassment of witness Conley. After the noon recess, respondent attempted to use a chart or card which indicated the amount of alcoholic beverage a person of a certain size could use without being under the influence of alcohol. Respondent laid no foundation for the introduction of the card into evidence. Under the repeated objection to the introduction of said evidence by County At-

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torney John M. Keith, respondent continued his badgering and questioning in a loud and boisterous manner, completely ignoring the court and accused the court of attempting to influence the jury against respondent's client. During this latter event, Respondent pointed his finger at the Court in a very disrespectful and threatening manner after being admonished by the court to desist. Respondent's conduct during the trial caused the court to declare a mistrial and find respondent in contempt of court for his boisterous, haranguing and contemptuous attitude toward the court."

In addition, the Board of Governors recommended to the Court that Petitioner be suspended from the practice of law in the Commonwealth for a period of one (1) month and be ordered to pay the costs of this action. Pursuant to these recommendations, a rule was issued by the court for the Petitioner to show cause why the recommendations of the Board of Governors should not be made absolute. The Petitioner duly filed a response and Respondent filed a reply to the response.

On January 17, 1975, in a Per Curiam Opinion, the Court of Appeals of Kentucky, full court sitting and concurring, found Petitioner guilty on Count I of the second charge set forth above and Counts II, III and IV of the second charge providing respectively:

II.

"In the Nicholas County Circuit Court case of *Commonwealth vs. Morgan,* Respondent Richard J. Getty, during his representation of the defendant, Morgan, on or about October 6, 1972, was continually reprimanded by the court for his arrogant, abusive attitude, for continually interrupting the Commonwealth's Attorney in the presentation

of the Commonwealth's case; and refusing to listen to objections made by the Commonwealth's Attorney. At the noon adjournment in the small lobby of the courtroom, respondent became abusive toward Nicholas County Attorney Charles Cox who assisted in the prosecution of the Morgan case and accused said Cox of tampering with the witnesses in the case before October 6, 1972. Following this event, respondent followed Commonwealth's Attorney G. L. Tucker into the office of said Cox and continued to harrass and make abusive statements to the Commonwealth's Attorney. During this latter conversation, respondent grabbed the Commonwealth's Attorney by his left shoulder."

III.

"In the Nicholas County Court case styled *Commonwealth vs. William Hilander, Jr.,* Respondent Richard J. Getty, during his representation of the defendant, Hilander, at an examining trial on or about December 11, 1972, attempted to disrupt the court proceeding which resulted in an admonishment to respondent from County Judge Lloyd Clark concerning his decorum in the courtroom. At the noon recess the court threatened to discontinue the examining trial completely. During a short intermission in the proceeding, respondent became abusive to State Police Detective Charles Seay in the County Judge's office nearly resulting in a physical fight with the detective."

IV.

"Respondent had engaged the services of Nancy R. Lyons, secretary to the Nicholas County Attorney, to make a transcript of testimony at the examining trial in *Commonwealth vs. William Hilander, Jr.,* Nicholas County Court. When said Lyons refused to give respondent the transcript until he had paid for the same, respondent subsequently accused said Lyons of not having properly

> **transcribed her notes and accused County Attorney Charles M. Cox of influencing her transcription of said notes, both of which accusations are misrepresentations."**

Petitioner was ordered suspended from the practice of law for six months and ordered to pay the costs of the proceeding.

Petitioner filed a Petition for Rehearing in the Court of Appeals of Kentucky on February 13, 1975. Respondent filed a Response to the Petition. On April 25, 1975, the court overruled Petitioner's Petition for Rehearing with the full court sitting. On May 2, 1975, the mandate of the court was stayed by the court to permit Petitioner to make application to this Court for Writ of Certiorari. Petitioner filed his Petition for a Writ of Certiorari in this Court on July 23, 1975. On July 28, 1975, Justice Thurgood Marshall denied Petitioner's application to further stay the mandate of the Court of Appeals of Kentucky.

ARGUMENT

The issues raised by the Petitioner in his Petition for Writ of Certiorari concern the constitutionality of the procedures utilized by the Court of Appeals of Kentucky in disciplining a member of the Kentucky Bar Association.

Each issue raised by Petitioner will be answered briefly after a short consideration of the general issues in the case at bar.

I.

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND.

The constitutional issues raised by the Petitioner in his Petition for Rehearing before the Court of Appeals of Kentucky were whether or not the disciplinary proceeding by the Kentucky Bar Association and the court were conducted in such a way as to deny him rights of procedural due process and equal protection of the laws under the Fifth and Fourteenth Amendments of the United States Constitution. (Petition, Appendix, pp. 1a-2a). The court in its Per Curiam Opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Court of Appeals and Kentucky case law, the findings of the trial committee and the Board of Governors were only advisory; and the court itself made an independent examination of the factual and legal issues involved. The court itself was the only body which could impose any disciplinary action and there was no denial of procedural due process.

The court has clearly stated this position in its Opinion below:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding. *Kentucky State Bar Association v. Stivers,* Ky., 475 S.W.2d 900 (1972)." (Petition, Appendix, p. 22a).

The Court went on to point out in the *Stivers* opinion:

> "But it must be recognized that its action is nothing more than advisory to this Court. So far

> as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted." (p. 904)
>
> * * * * *
>
> "In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904)

It is equally clear that the Court did exercise its own judgment by the fact that it refused to follow the recommendations of the Board concerning both some recommended findings of fact and recommended discipline.

The constitutional issues raised by Petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There were no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law.

Another issue raised by the Petitioner in his brief before the Court of Appeals concerned the evidentiary findings made by the trial committee. This issue was clearly defined by the court upon independent nonfederal grounds. The court held that the report and recommendations of the trial committee and Board were only advisory.

The court in its role as fact finder specifically and unequivocally held:

> "This court is unanimous in the opinion that the charges contained in Counts I through IV of Charge 2 are sustained by a preponderance of the evidence." (Petition, Appendix, p. 26a).

The Petitioner has requested this court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Court of Appeals clearly reveals that the results reached in this case by the Court of Appeals of Kentucky were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals of Kentucky.

II.

THE DISCIPLINARY PROCEEDING OF THE KENTUCKY BAR ASSOCIATION AND THE COURT OF APPEALS OF KENTUCKY DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, NOR DENY HIM HIS FIRST AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

Petitioner argues that an attorney is deprived of his rights of procedural due process and equal protection of the laws afforded him by the Constitution of the United States when the Court of Appeals of Kentucky sits as a trial judge without having personal observations of witnesses to protect the accused from prejudice.

Under an order of the Chief Justice of the Court of Appeals of Kentucky dated June 26, 1973, the chairman of the trial committee charged with the duty of hearing evidence in the case was designated and commissioned by the court to hear the evidence involved in this disciplinary proceeding. (Appendix B, p. 1b).

The entire disciplinary proceedings of the Kentucky Bar Association result from both a constitutional delegation of legislative authority of the Kentucky General Assembly directing the court to set ethical standards and disciplinary procedures to enforce those standards by virtue of KRS 30.170 (Petition, Appendix, pp. 2a-3a) and the widely recognized inherent power of Court of Appeals of Kentucky to establish rules of practice and procedure for disciplining attorneys. *Chreste v. Commonwealth,* 171 Ky. Rept. 77 (1916); *Commonwealth v. Buckingham,* 267 Ky. Rept. 627 (1937); *In re Rudd,* 310 Ky. Rept. 630 (1949); *Kentucky State Bar Assn. v. Stivers,* Ky., 475 S.W.2d 900 (1972) (Cert. denied, 406 U.S. 968).

The Respondent herein serving as an administrative arm of the Court of Appeals of Kentucky conducted, through its Inquiry Tribunal (in effect finds probable cause to believe unprofessional conduct has occurred and thereby votes a charge), its trial committees and its Board of Governors, proceedings to form a record showing Petitioner's misconduct and giving advice to the court on recommended findings of fact and the degree of discipline to be imposed. Petitioner alleges no unconstitutional procedures at the trial committee stage when the transcript of evidence was made for the court. All constitutional safeguards were provided the Petitioner at this stage of the proceedings, including (a) the right to challenge the qualifications of any member of the trial committee, RCA 3.250; (b) the right to be represented by counsel, RCA 3.300; (c) right to a hearing, RCA 3.300; and (d) all rights afforded a party by the Rules of Civil Procedure, including the right to introduce evidence, cross-examine

witnesses, compel the attendance of witnesses, the right to remain silent, RCA 3.300. (Appendix A, p. 1a).

The trial committee proceedings, therefore, were without question in conformity, compliance, and with complete regard for the Petitioner's rights to procedural due process. The Petitioner did not intimidate or suggest that any evidence, reports, etc., were improperly before the trial committee or that they were in any way influenced by any testimony not presented into evidence, all of which the Petitioner had a right to inspect and cross-examine. RCA 3.350 specifically provides that the proceedings shall be reported, and if the recommendation is other than a private reprimand then the proceedings shall be transcribed. (Appendix A, p. 2a). It is the transcript of evidence at the trial committee hearing which provides the court with the necessary information on which to base its decision as to disciplinary sanctions. They had before them the "evidence" that was in fact before the trial committee, all of which was subject to objections and cross-examination by petitioner's counsel.

The rules provide a further step in which the Board of Governors considers the entire record. It may then decide whether the accused is guilty or not guilty. It affords additional protection in that if the accused is found not guilty, the Board's action is final. See RCA 3.370. (Appendix A, pp. 2a-3a). If an accused is guilty, the Board then votes on the degree of disciplinary action to be recommended. Other than a private reprimand, all degrees of discipline are *only recommendations* to the court. The rules specifically recognize that *any order recommending to the court that disciplinary action be taken shall be advisory only.* RCA 3.370. (Appendix, pp. 2a-3a).

The Court of Appeals then under its inherent and statutorily recognized powers ultimately passes on the question of whether or not the accused is guilty of professional misconduct; and if so, the degree of discipline to be imposed. The Court of Appeals is the only body empowered to impose discipline other than a private reprimand.

The recitation of the procedure is extremely important in exposing two very basic points:

(1) The *trial committee is the hearer of evidence* and they provide all the constitutional safeguards to the accused and make a transcript of all the evidence, and

(2) The Court of Appeals is the *only* body which can or does officially impose any sanction or passes finally on the guilt or innocence of the attorney as well as the imposition of discipline.

Therefore, it is clear that the trial committee and Board of Governors were acting only in an advisory capacity based on the evidence presented at the trial committee hearing. The Board of Governors and the trial committee are in no way the adjudicators of *fact* and in no way render any *final decision* in regard to disciplinary sanctions. It is merely an advisory agent of the court and as the name suggests, its advice may be freely rejected by the court which it frequently has done, and which it in fact did in this case by increasing the suspension from a recommended one month to a six month suspension. It is certainly clear that "the court" is the only one that will make the ultimate decision in disciplinary cases.

The Court of Appeals of Kentucky clearly stated in its opinion it had reviewed all of the evidence presented. (Petition, Appendix, p. 20a). It had the advice of the trial committee who observed the witnesses during the evidentiary hearing and the Board of Governors. It is submitted that the fact the witnesses at the hearing did not personally appear and testify before the Court of Appeals of Kentucky in no way denied Petitioner his constitutional rights. The evidence in this case was accurately, completely and clearly before the court in the disciplinary transcripts.

It is interesting to note that in the Harrison County contempt case comprising Count I of the second charge, Petitioner was found in contempt by the county court, had a de novo trial on the contempt citation in circuit court which affirmed the county court, plus forums for reply before the Inquiry Tribunal of Respondent, a full trial hearing on all the evidence, a review of all the evidence by the Board of Governors of the state bar association and finally a full review of all evidence before the Court of Appeals of Kentucky after responding to a rule to show cause and later the filing of a petition for rehearing. Beyond any doubt whatsoever, Petitioner has had all his due process rights protected throughout all proceedings involving this matter.

The first charge which was recommended for dismissal by the trial committee, the Board of Governors and the Court of Appeals demonstrated the ability of the latter two forums to review a transcript, weigh testimony and find for Petitioner without personal appearance of witnesses before the court. The same expertise of these forums is demonstrated in finding Petitioner guilty as charged on counts in the second charge. The guilt findings are well founded in the record showing a severe course of unethical and unprofessional conduct impeding the administration of

justice. The court in fact used its own judgment from a review of all the evidence. The clear course of unethical and unprofessional conduct openly displayed by Petitioner was clearly cited by the court. (Petition, Appendix, pp. 24a-25a).

Petitioner contends that the many inconsistencies in the testimony of witnesses made personal observations of witnesses giving evidence in the record by the Court of Appeals of Kentucky especially neecssary to a determination of credibility. It is submitted that the Court of Appeals of Kentucky, an appellate court, is well qualified to review a transcript and ascertain the truth therefrom after weighing all the evidence. All records have their inconsistencies. The proposition is not foreign to appellate courts. The record in this case was extremely detailed and well documented.

Petitioner argues for the first time in this disciplinary case in his Petition for Writ of Certiorari that the Court of Appeals of Kentucky holds that these cases are civil rather than quasi-criminal in nature. While this argument was never raised in the Court of Appeals of Kentucky and it is not properly before this court, the erroneous argument will be answered. While older decisions of the Court of Appeals of Kentucky state that disciplinary rules are civil in nature, Rule 3 of that court recognized and fully protected Petitioner's rights to procedural due process of law without exception. Respondent cites with pride its compliance with the American Bar Association's Report on Disciplinary Enforcement (1970) authored by retired Supreme Court Justice Tom C. Clark. A comparison of the model rules for state disciplinary agencies when they were released in 1970 and Rule 3 of the Court of

Appeals of Kentucky in effect at that time will show that Kentucky had the model structure almost without exception. Amendments to Rule 3 effective July 2, 1971, brought Kentucky in nearly complete compliance with the model. This court reviewed these procedures in Kentucky in *Kentucky State Bar Assn. v. Stivers, supra,* and denied a petition for writ of certiorari. This court again reviewed Kentucky's disciplinary rules in the case of *Kentucky State Bar Assn. v. Smith*, Ky., 492 S.W.2d 880 (1973), (cert. denied, 414 U.S. 859). The impact of the Clark report has been felt in every state. There has been a restructuring of disciplinary machinery in most states. Effective guidelines insuring procedural due process of law in disciplinary proceedings are in existence and proving extremely effective in Kentucky. State action has proved effective and no action by this court is needed. The Court of Appeals of Kentucky exercising its inherent power has made the burden of proof in disciplinary cases on Respondent by a test of proving unethical and unprofessional conduct by a preponderance of the evidence. This test is effective and fair to all. This test was set by the court in its discretion and is a matter of state law, raising no federal question.

Petitioner argues that KRS 30.170 creating a unified bar in Kentucky is lacking in standards and procedural safeguards as to make its effects uncertain as to deny attorneys due process of law and equal protection of the law, as well as permitting the Court of Appeals of Kentucky to enact rules susceptible of sweeping and improper application limiting first amendment freedoms. (Petition, Appendix, pp. 1a, 2a).

It is clear in Kentucky law that the Court of Appeals of Kentucky has inherent authority outside of

KRS 30.170 to promulgate its Rule 3. In speaking of the repeal of an old Kentucky statute providing for disciplinary measures where an attorney is convicted of a felony, the court stated:

> "The repeal of a statute pertaining to the practice of law amounts to a recognition on the part of the legislative branch of government of the inherent power of the judicial branch to prescribe such rules as are necessary to qualify, regulate and govern its own officers. 'All courts have, as an incident of the power to admit attorneys to their bar, the power to disbar them for such conduct as shows they are not longer worthy of confidence.' *Underwood v. Commonwealth,* 105 S.W. 151, 32 Ky. Law Rep. 32." *In re Rudd,* Ky., 221 S.W.2d 688 at 689 (1949).

The Respondent has argued above that Rule 3 of the Court of Appeals of Kentucky are model disciplinary rules. They are clear and certain. They afforded Petitioner every constitutional safeguard as a matter of Kentucky law. No valid federal question is raised in Petitioner's argument.

RCA 3.130 recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of professional conduct required of members of the bar and that charges may be brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute. (Petition, Appendix pp. 3a-4a). Petitioner would have this court believe that the Court of Appeals of Kentucky disciplined Respondent just because Petitioner out of the courtroom called a county attorney a "damn liar." (Petition, p. 46). Petitioner contends such conduct is protected by the First Amendment to the Constitution of the United States. The court's per curiam found on two instances he had used such language *in addition* to paying no attention to the rulings of the judge, being loud and boisterous, badgered and harrassed a witness and pointed his finger a short distance from the trial judge in a threatening and disrespectful manner. (Petition, Appendix, pp. 22a-23a). All of these factors caused the court to declare a mistrial and concluded with Petitioner being found in contempt of court. There is no doubt that such conduct clearly is prejudicial to the administration and adversely reflects on Petitioner's fitness to practice law under the American Bar Association Code of Professional Conduct DR 1-102(A) (5), (6) stating:

> "DR 1-102 Misconduct
> (A) A lawyer shall not:
> (5) Engage in conduct that is prejudicial to the administration of justice.
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Obviously, the First Amendment protection of freedom of speech does not license a lawyer to be disrespectful to another officer of the court and the judge —in or out of the courtroom thereby causing a failure in the administration of justice in the courts. It is submitted that the seven Justices on the Court of Appeals of Kentucky, elected by the popular vote of their constituents, are well qualified to represent the public in determining what standards of conduct should be met by officers of the court in Kentucky. The court has used sound discretion in setting standards of conduct for officers of the court. There is no federal question raised in connection with these standards.

Petitioner argues that because he was found innocent on the counts of the first charge by the Court of Appeals of Kentucky he should not have to pay all the costs in the proceeding as required by RCA 3.450 (Appendix A, pp. 3a-4a). The court has determined in its sound discretion that in disciplinary matters where a lawyer has been disciplined he must pay the costs of the proceeding rather than place the cost on Respondent which is solely supported by the dues of its members. The concept is not only fair and reasonable, but sound as a matter of policy. The Court of Appeals of Kentucky had before it the issue of whether the provisions of RCA 3.450 should be waived in Petitioner's case. The court, using its sound discretion, denied the request for waiver. No federal question is raised in connection with this decision.

In summary, the position of the United States Supreme Court, in relation to the fundamental interest of the states in setting standards for professions, has been recently affirmed in *Goldfarb v. Virginia State Bar, et al.*, 95 S.Ct. 2004 (1975) at p. 2016, when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' See Sperry v. Florida, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed.2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed.2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions."

The decision below was based, in fact, on an adequate and independent non-federal ground.

III.

THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT.

Petitioner argues that his six months suspension period was so lacking of a rational basis in evidence as to be arbitrary and discriminatory and thus a denial to him of due process of law and equal protection of the laws.

Petitioner contends that the charges filed by Respondent were instituted by the state bar association: not by parties observing his conduct. Petitioner accuses the Court of Appeals of Kentucky of ignoring evidence in the record.

The Court of Appeals of Kentucky has clearly defined the authority of the state bar association to institute disciplinary investigations it finds appropriate to discover unprofessional conduct on the part of a lawyer. *In re Gilbert*, 118 S.W.2d 535 at 536 (1938).

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It is clear in the Per Curiam Opinion below the Court of Appeals of Kentucky reviewed the ten volumes of evidence heard by the trial committee and the Board of Governors. (Petition, Appendix, p. 20a). The opinion clearly states the evidence it found in the record to support its findings.

The trial committee's findings of fact are not so much at variance with the finding of the Court of Appeals of Kentucky as to the allegations of the counts of the second charge as are the standards of conduct applied to the common facts found by both bodies. The court clearly stated the standard applied by the trial committee will have to be upgraded. (Petition, Appendix, p. 24a). A six months suspension period in view of the aggravated course of unprofessional conduct displayed by Petitioner is certainly reasonable. An advocate's excesses cannot be tolerated:

> "We suppose that an attempt to outlaw gallery play in the courtroom would be about as successful as the current effort to ban the private possession of firearms. Nevertheless, intoxication induced by his own histrionics cannot excuse an advocate's excesses. He indulges at his own risk. Under our system the jury's function is to weigh the evidence unalloyed by other factors, and it is the lawyer's obligation to preserve the integrity of that system. The intentional introduction of improper information or comment amount in plain words to cheating.
>
> It is common knowledge that in certain widely publicized trials of recent years a new breed of lawyers has instituted the studied technique of baiting the trial judge in order to convey to the public an impression that its courts are instruments of discrimination and injustice. Frequent contempt citations are the hallmark of that technique. It will not be tolerated in this jurisdiction." *Ky. State Bar Assn. v. Taylor,* Ky., 482 S.W.2d 574 at 583, 584 (1972).

Petitioner seeks to relitigate his case on factual issues before this court. A cursory examination of the court's opinion in this case reveals that the court considered all the factual and evidentiary matters in this case. If the court gave little significance to the Petitioner's evidence it was due to a lack of credibility of the evidence and not due to an oversight on the part of the court. Here again, the Petitioner has urged as a reason for granting certiorari an issue which is not valid. The factual determination by the Court of Appeals and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of August, 1975, I served on Honorable Raymond Francis Connell, 326 Main Street, Paris, Kentucky 40361, Attorney for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER

APPENDIX

APPENDIX A

RULES OF THE COURT OF APPEALS OF KENTUCKY

3.250 Challenge to Qualifications of Trial Committee.

Any time, not later than ten days before the date set for hearing the respondent may, by motion, challenge for cause any member of the Trial Committee. If the challenge is such as might disqualify a circuit judge, the Chairman of the House shall relieve the challenged member and immediately fill the vacancy.

3.260 Joinder and Consolidation.

(a) Any number of acts or omissions, and any number of separate and distinct transactions, alleged to constitute unprofessional conduct on the part of an attorney may be alleged in a single charge in separate counts. Separate charges may, by order of the Tribunal be consolidated and tried as a single disciplinary case.

(b) A charge may be filed against two or more attorneys if based on the same or related state of facts and separate charges against two or more attorneys based upon the same or related state of facts may, by order of the Tribunal, be consolidated and tried as a single disciplinary proceeding. Where two or more attorneys are proceeded against in the same proceeding the Trial Committee shall make a separate report to the Board as to each.

3.300 Rights of Respondent Against Whom a Charge has been Filed.

The respondent against whom a charge has been filed shall have the right to be represented by counsel

and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himeslf by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

3.350 Transcript of Evidence.

The proceedings before the Trial Committee shall be reported by a reporter appointed by the Trial Committee. However, after hearing, if the Trial Committee is of the unanimous opinion that the respondent should only be administered a private reprimand or that all charges should be dismissed the Trial Committee may, with the consent of the parties, direct the reporter to preserve all notes of the hearing but defer a transcription of the record until ordered by the Board to prepare such transcript. In all other proceedings the testimony shall be transcribed.

3.370 Board's Action on Trial Committee's Report.

Upon receipt of the report of the Trial Committee the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice President and the fourteen duly elected mem-

brs of the Board from their respective appellate districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge, shall be disqualified and the Chief Justice shall appoint a member to consider and act on the case.

The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the Board's action is final. If the respondent be found guilty, the Board shall then decide by a second roll call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in the proceedings. The result of each of the two votes shall be recorded in the Board's minutes. The President shall sign and file with the Director an order setting forth the Board's action, and the Director shall mail copies of such order together with a copy of the Trial Committee's report to the parties or their counsel and to each member of the Tribunal. If discipline is recommended the entire record, together with a certified bill for costs and expense incurred in the investigation preliminary to, and in the conduct of, the proceedings shall be filed with the Clerk. Any recommendation to the Court that disciplinary action be taken shall be advisory.

3.450 Recovery of Costs.

(a) Every final order of the Board or the Court which adjudges the respondent guilty of unprofessional conduct shall provide for the recovery of all costs, including those certified under RCA 3.370. Immedi-

ately upon the effective date of the order the Clerk shall furnish a cost bill to the respondent, and if the bill is not satisfied within ten days thereafter, the Clerk shall issue one or more executions thereon, directed to the sheriffs of the counties in which the respondent and the sureties on his bond reside. So much of the costs collected by the Clerk as represent those incurred by the Board shall be promptly refunded to the Association.

(b) Upon a final order of the dismissal of a complaint, cost may be assessed against the complainant if the Board feels the complaint groundless or made maliciously.

APPENDIX B

ORDER OF CHIEF JUSTICE DATED JUNE 26, 1973

COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

V. DESIGNATION OF CHAIRMAN OF TRIAL COMMITTEE

RICHARD J. GETTY - - - - - - - *Respondent*

Pursuant to RCA 3.230, Hon. Robert E. Wohlwender, of Covington, Kentucky, is hereby designated and commissioned as Chairman of the Trial Committee heretofore appointed by the Chairman of the House of Delegates to try the issues in this proceeding.

This 26th day of June, 1973.

JOHN S. PALMORE
Chief Justice